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Supreme Court, U.S.
FILED

021469 JAN 27 2003

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NO. _____

In The
SUPREME COURT of the UNITED STATES

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JEAN SCHIEDLER-BROWN,
Lawyer
*Petitioner*

vs.

WASHINGTON STATE BAR ASSOCIATION,

*Respondent*

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On Petition for Writ of Certiorari to the
Supreme Court of the State of Washington

# PETITION FOR WRIT OF CERTIORARI

**JEAN SCHIEDLER-BROWN,**
***Attorney of record for Petitioner***

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## QUESTIONS PRESENTED FOR REVIEW

1. Is a lawyer deprived of procedural due process when a State violates its discovery rules by depriving the lawyer of confidential Bar Association files necessary to prove the proportionality, or equal protection, defense, that each and every similar case has been dismissed without public action taken.

2. Is a lawyer deprived of equal protection when a public admonition is imposed, if no other lawyer has been similarly sanctioned, the lawyer's conduct was consistent with similarly situated lawyers who were not disciplined, and the Bar Association's own policies prescribe dismissal of the matter?

3. Is a lawyer deprived of substantive due process when a public admonition is imposed, if the Bar Association thereby violates its own standards and published policies, and the only evidence of record supports the propriety of the lawyer's conduct?

**PARTIES TO THE PROCEEDING:**

**Jean Schiedler-Brown,** an attorney admitted to practice before the Washington State Bar Association, WSBA # 7753 is the petitioner. The petitioner is referred to herein as the lawyer, or Schiedler-Brown.

**The Washington State Bar Association,** a State agency established by RCW 2.48.010 *et seq* which states in part: **"There is hereby created as an agency of the state, for the purpose and with the powers hereinafter set forth, an association to be known as the Washington State bar Association, hereinafter designated as the state bar, which association shall have a common seal and may sue and be sued, . . ."** is the respondent. The respondent is referred to herein as WSBA.

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**OTHER AUTHORITIES**

**14th Amendment of the United States Constitution:**
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CR 26 (b) (1) 7

"Washington's Lawyer Discipline System," Barry Althoff
***Washington State Bar News***, Nov., 2001 10

**CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS:**

Order denying discretionary review, In re Lawyer, Jean Schiedler-Brown, # 7753, dated October 31, 2002.

WSBA disciplinary board order, # 00-00136, dated July 19, 2002.

Amended findings of fact, conclusions of law, and hearing officer's recommendation, # 00136

**BASIS FOR JURISDICTION IN THIS COURT:**

The Washington State Supreme Court entered its decision October 31, 2002; Per Supreme Court Rule 13 (1), this petition is timely. Jurisdiction is conferred by Title 28, U.S. Code, Chapter 81, Section 1257.

**CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE:**

Relevant portions of Amendment 14, section 1, second sentence, clause two to the end: **"nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

**FEDERAL QUESTION TIMELY RAISED:**

The sole opportunity for court review of the WSBA disciplinary process is a Petition for Discretionary Review

to the Washington State Supreme Court.
The federal questions were timely raised, at pages 1—2, and 13—16 of the Petition for Discretionary Review, set forth in relevant portions in Appendix D herein.

## ARGUMENT SUPPORTING REVIEW

FACTS: The following facts are undisputed: the attorney acted diligently, her conduct did not prejudice the client's case. Her office communicated with the client approximately 30 days before his next possible court deadline. Most indigent offenders do not receive as much as 30 days' notice from the time their appeal is denied until the next review must be filed.

No public admonitions have been issued by the WSBA for failure to reasonably communicate, unless the client was prejudiced or there was other unethical behavior No other criminal defense attorney has been admonished, except after a judicial finding of abandonment of an appeal; WSBA written standards for criminal defense lawyers are to dismiss complaints unless there is a finding of misconduct by a tribunal.

The WSBA investigator declined to recommend discipline or admonishment. (Exh. 34). Four of the 10 members of the disciplinary committee, disagreed with the admonishment. (Appendix B)

Early in 1997, Law offices of Jean Schiedler-Brown and Associates agreed to file an appellate brief for William Rayburn, a prison inmate. The lawyer, a supervising attorney, served Mr. Rayburn through a State contract to assist indigent inmates. (ROP 59)

The State contract seeks to serve as many inmates as possible with fixed resources, with over 2,000 potential clients. (ROP 59, lines 21—25, and page 60.) The firm must prioritize and exercise judgment to provide services as limited by staffing and funding. (ROP at 62). The firm promised, by letter, to complete a brief to the 9th Circuit Court of Appeals, for Mr. Rayburn. It carefully limited the scope of service, by writing him that to assist further, the firm would have to "screen your case again." (Exh 24).

Mr. Rayburn had previously requested assistance of the firm, and he knew that legal aid was limited. ROP 21, l. 2,3 and ROP 23, lines 3—12

He did his appeal pro se through the State courts. (ROP 18, lines 17—23) He knew from experience that appellate processes could take many months. (ROP 19, lines 3—7): He also know that once the brief was filed, there was no action until a court decision.(ROP lines 2—8)

The firm regularly communicated with Mr. Rayburn and sent him a copy of the brief; ( Exh. 25.) On August 25, 1997, the firm sent the reply brief to Mr. Rayburn. (Exh. 33). Less than 2 weeks later, Mr. Rayburn wrote to counsel. ROP 30, lines 16—24) He admitted to a habit of writing approximately once a month for status reports regarding legal matters. ROP 31, lines 6--25

The firm managed time and money to safeguard the ability to provide services equitably to inmates. ROP 60--64: The firm viewed its responsibility to communicate with inmates in balance with the responsibility to equitably administer state funding for legal assistance. ROP 75, 76

Mr. Rayburn complained that during 1997 and 1998 lawyer Jean Schiedler-Brown failed to communicate with

him. The hearing examiner found:

**"Schiedler-Brown's conduct in failing to keep her client reasonably informed and respond to reasonable requests for information violated RPC 1.4 (communication) and/or RCP 5.1 (responsibilities of a partner or supervising lawyer.) With respect to this conduct Schiedler-Brown acted negligently." (See Appendix C)**

An admonition was ordered; it was narrowly upheld by the disciplinary committee in a split vote of 6 to 4. (Appendix B)

The lawyer's motion to discover all RPC 1.4 complaints for the past 5 years against lawyers (nondisciplinary files that are confidential)-- prehearing, during the hearing, and post hearing,-- was denied.

The WSBA presented no evidence on the standard of practice for communication with an indigent defendant after an appeal has been perfected. The lawyer testified:

> **The kinds of requests for review that I receive from inmates as part of my contract include a high percentage of the inmates concern[ed] about communication with their appellate counsel, counsel that is appointed, and required to represent them through appeals as a matter of right. And because of that contact, I'm aware after having actually reviewed their correspondence files, that it is not the standard of practice in the State of Washington for public defenders,--for counsel appointed for indigent clients to continue to communicate with clients once they have submitted the final brief in an**

**appellate situation.**

**And in fact, it isn't a standard practice to notify, necessarily, when the decision is rendered. Many of the inmates that I meet with tell me that they receive notification from the various courts when a decision is rendered in their case. And Mr. Rayburn testified here that he received information from the court as to the result of his case.**

**The reason for that practice is number one, sheer volume. There are no resources to continue to keep up with communication with a client about the case once the work for the client is finished. The dollars that are provided for state representation of indigents are very inadequate, and they need to be used to deliver services, and not to continuously communicate with clients after the operable portions of the communication are completed. (ROP, 73—74)**

The lawyer learned that Mr. Rayburn's appeal was denied on December 27, 1997. The week of February 20, her firm conveyed a telephone message to the inmate's counselor, regarding the case status. Also, Mr. Rayburn recalled receiving a notice from the court sometime in "February or March." (ROP 14, line 23 and page 15, lines 1--3.) This is consistent with the court having previously copied him on correspondence regarding the case, i.e., Exh. 3. He also recalled receiving the telephone message, in February, 1998, from Schiedler-Brown's offices. (ROP page 15, line 4—6)

## SUMMARY OF ARGUMENT

By publicly admonishing a lawyer without regard for objective standards of practice or the treatment of similarly situated lawyers, or past WSBA practices or WSBA written policy, the WSBA violated due process and equal protection rights of the lawyer.

Numerous U. S. Supreme Court decisions and State court decisions –tacitly approved, when certiorari denials allowed them to stand—recognize that lawyers enjoy the right to procedural due process, including discovering evidence that will provide a meaningful hearing; that lawyers have the right to be treated equally unless there is a rational basis for differing treatment; that lawyers can expect not to be disciplined unless the basis for discipline has a rational relationship to the legitimate purpose of the regulatory scheme. The Actions of the WSBA, as upheld by the Washington State Supreme court, hang by the majority vote of just one Disciplinary Committee member and are contrary to the general decisions by This Court, and to the principles voiced by the highest courts of numerous other States. In its response to the Petition for Discretionary Review to the Washington State Supreme court, the WSBA successfully urged that equal protection analysis requires a showing of illegal motive-- (citing to discretionary prosecution law in the criminal context)-- and that due process does not compel the right to confidential files showing how the WSBA treats similarly situated lawyers. (Bar Association Response, pp. 5,6) These arguments do not correctly state or apply the Constitutional standards, as set forth below: The Washington State Courts, by adopting the position of the WSBA, prevent the lawyer from the means with which to demonstrate the standard of practice by discovering how the WSBA has treated similar complaints against other lawyers. Further, the absolute right to rational,

and not arbitrary, expectations in establishing professional standards, is twisted so that ethical conduct becomes a matter of opinion, judgment, or preference, instead of a standard by which all lawyers can expect to be equally held. Instead of due process, professional discipline is fundamentally unfair when the WSBA chooses to violate its own written standards to excessively punish one member. The destructive impact of this failure to comply with the 14th Amendment of the United States Constitution is to encourage a professional to be more concerned whether an action might result in discipline than whether it is legally necessary or advisable.

**Is a lawyer deprived of procedural due process when a State violates its discovery rules by depriving the lawyer of confidential Bar Association files necessary to prove the proportionality, or equal protection, defense, that each and every similar case has been dismissed?**

Procedural Due Process may take many forms, for the essence is achieving fundamental fairness. ***In Re Dodsen*** 572 A.2d 328, 214 Conn 344, *cert. den* 111 S.Ct.247, 498 US 896, 112 L.Ed 205 (1990). To determine if particular process is due a party, the court must balance the private interest, the risk of erroneous deprivation of the private interest, the probative value of the additional process, and the economic burden on the government. ***Price v. Carpenter*** (N.D. Tex 1991) 758 F.Supp 403, Aff'd 951 F2d 346, *cert den* 112 S.Ct 2942, 504 U.S. 974, 119 L.Ed.2d 566. In this case, the lawyer's only source of evidence regarding past WSBA acts was in the exclusive control of the WSBA. The practice of law is a property interest, and cannot be deprived without due process. ***Truax v. Corrigan*** 42 S.Ct. 124, 257 U.S. 312, 66 L. Ed. 254 (1921). *Accord* ***Conway v. State Bar of California*** (1989) 767 P.2d 657, 47 C.3d 1107, 255 Cal. Rptr 390;

***State ex rel Nebraska State Bar v. Dineen***_(1990) 455 N.W. 2d 178, 235 Neb 363***; Matter of Deming*** 108 Wn2d 82, 736 P.2d 639 (1987). The practice of law is also a liberty interest, for insofar as a person is deprived of the right to labor, liberty is restricted. ***Smith v. Texas***_(1914) 34 S.Ct 681, 233 U.S. 630, 636, 58 L. Ed. 1129.

In this case, **Rules of Lawyer Discipline (RLD) of the** WSBA subject disciplinary process to Superior Court Rules. **(RLD 11.1)** *Washington State Superior court Civil Rule* **(CR) 26(b) (1)** states in relevant part:

**"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. "**

The WSBA denied discovery contrary to ***Guillen v. Pierce County***_144 Wn. 2d 696 (2000), which held that confidential state files-- motor vehicle accident reports-- are discoverable pursuant to CR 26. WSBA files are also confidential state files. Another Washington case, ***Cook v. King County*** 9 Wn App 50 (1973) ordered discovery of confidential internal investigatory police files. Washington State violated its own procedural mandate by denying the lawyer WSBA files, arguing (on appeal—no such facts were presented below) that there are "thousands" of such dismissed complaints and production would be too burdensome. The existence of so many complaints—all of them dismissed--demonstrate that Schiedler-Brown's position is likely the fact—most complaints are dismissed, and she has a right to demonstrate that she is similarly situated to that class.

To show a due process violation, a party must show

more than a rule violation. A party must additionally demonstreate that a rule violation deprives the lawyer of a meaningful hearing. ***In re Ruffalo*** (1968) 390 U.S. 544, 88 S.Ct. 1222, 20 L. Ed. 2d 117, *rehear den* 391 U.S. 961, 88 S.Ct 1833, 20 L. Ed 2d 874. *Accord,* for judicial disciplinary processes. ***In re Zoarski*** (Conn. 1993) 632 A.2d 1114, 227 Conn 784. The failure of the Washington Court and the WSBA to honor its own discovery rules prevented a meaningful hearing because the wsba had exclusive possession of the evidence needed by the lawyer for her defense.

One of the elements that a lawyer is entitled to prove in defense of a sanction in Washington State is proportionality. ***In re the Discipline of Haskell*** 136 Wn 2d 300 (1998) ***Haskell*** established that a lawyer has a right to discipline that does not depart significantly from sanctions imposed in similar cases. There, the sanction for the lawyer was, per ABA standards, disbarment. Yet, the Court departed from ABA standards because the discipline was different than that usually imposed on other Washington lawyers.

In this case, the lawyer made an offer of proof that WSBA files would prove that only advisory letters and dismissals have been issued for communication complaints when there was no prejudice to the client. (***ROP*** 238). Denial of the relevant proportionality data was a denial of procedural due process. The lack of the data deprived her of a meaningful opportunity to be heard. Fundamental fairness was actually, not merely hypothetically, destroyed. *Accord,* ***Matter of Wineman*** (Ind. 1977) 367 N.E. 2d 1368, 270 Ind. 344 *cert den* 98 S.Ct. 2234, 436 U.S. 904, 56 L. Ed. 2d 402 [main volume] *cert den* 100 S.Ct 1835, 446 U.S. 908, 64 L. Ed. 2d 261.

Other States uphold the constitutional right to discover confidential complaint files to effectively defend against a professional disciplinary proceeding. ***Mcdarnette v. Sobol*** (NYAD 3 Dept. 1993) 597 NYS 2d 840, 190 AD2d 229, *Mot.dism app.den* 633 N.E. 2d 479, 677 N.W.S2d 125, 83 NY 2d 776; *aff'd* 632 N.E. 2d 866, 610 NYS 2d 460, 83 NY 2d 333. Evidence is of Constitutional magnitude if a party is prejudiced without it. ***Fromer v. Boyer-Napert Partnership*** (Conn Super 1990) 599 A.2d 398, 26 Conn App 185.

This court has denied certiorari for several of the above-cited cases, implying that it approves of the due process standards expressed. It should now review and make clear that all courts are bound thereby; this case should be reviewed because the action in Washington state, affecting Constitutional Rights conflicts with contrary decisions in other States..

**Is a lawyer deprived of equal protection when a public admonition is imposed, if no other lawyer has been similarly sanctioned, and the Bar Association's own policies prescribe dismissal of the matter?**

A lawyer's right to equal protection against arbitrary and capricious discipline, to be treated consistently with other similarly situated lawyers, is based upon the **Equal Protection clause of the 14th Amendment of the U.S. Constitution.** ***Nordinger v. Hahn*** (U.S. Cal 1992); 505 U. S. 1, 1121 S.Ct. 2326. The right to pursue a profession is not a fundamental right for equal protection purposes. Therefore, minimal scrutiny is the standard in an equal protection challenge, and the state action will be presumed valid if there is a rational relationship between disparity of treatment and some legitimate governmental

purpose. ***Heller v. Doe by Doe*** (U.S. Ky 1993), 509 U. S. 312, 113 S.Ct 2637, 125 L Ed., 2d 257. A government must advance a reasonable and identifiable objective for the action it takes. *Id* at 330. A party need not show that the differential treatment is a result of an illegal motive, per the incorrect WSBA analysis.

The objective of the ethics code is to safeguard the public; imposing discipline has no rational relationship to the facts in this matter, because the WSBA agreed that there was no prejudice to the client. A review of all of the public admonitions regarding client communications in Washington State,( Appendix F, Petition for discretionary review), reveals that no lawyer has been admonished when there was no prejudice to the client or other additional ethical violations. WSBA does not dispute this. It is also undisputed that lawyers representing indigent clients do not continue to communicate with prisoners after the final briefing of the case. ROP 73—74. Furthermore the WSBA has published a standard that grievances against criminal lawyers are dismissed unless there is a judicial finding of impropriety. "Washington Lawyer Discipline System", Barry Althoff, ***Washington State Bar News***, November, 2001. In fact, No criminal lawyers have been publicly admonished, except one who was found by a tribunal—consistently with the written standard-- to have abandoned an appeal. The lawyer has proved that she is similarly situated with lawyers who are not disciplined in Washington State.

Regulatory schemes cannot arbitrarily single out individuals with differing treatment when there is no rational relationship to a state goal for differing treatment. ***Kwik Shop inc. v. City of Lincoln*** (Neb, 1993) 498 N.W. 2d 102, 243 Neb 178 ; ***Hy-Vee Food Stores v. Nebraska Liquor Control*** (Neb 1993) 497 N.W. 2d 649, 242 Neb

752. (convenience stores cannot be treated differently when differences irrelevant to legislative goal of temperence.) When individuals whose situations are indistinguishable are treated differently, their equal protection rights are violated. ***Chiles v. State*** (Kan 1994) 869 P.2d 707, 254 Kan 888 *cert den* 115 S.Ct 149, 130 L. Ed 2d 88.

**There is no rational relationship to a State policy that would justify treating the lawyer in Washington State different from simlarly situated lawyers.** The decision in Washington State is in direct conflict with the reasoning of ***Glowacki v. State Board of Medical Examiners*** 501 N. W. 2d 539, (Iowa, 1993), where a physician's right to practice was curbed for "billing violations' that were not a danger to the public. The limits were a violation of equal protection because they bore no rational relation to the regulatory purpose of protecting the public, and only served to punish the physician more harshly than others. This court should review the actions of the WSBA, which has stipulated that the lawyer's actions never prejudiced her client. She was denied equal protection and singled out for harsher punishment, inconsistently with WSBA written policies and past practices.

**Is a lawyer deprived of substantive due process when a public admonition is imposed, if the Bar Association thereby violates its own standards and published policies?**

The right to substantive due process is analyzed using the rational basis standard, but unlike the equal protection analysis where treatment is compared to others, substantive due process regulates how the state treats an individual in fairness and based upon State law. ***Chiles v.Sstate*** (Kan

1994) 869 P.2d a707, 254 Kan 888 *cert den* 115 S. Ct 149, 130 L. Ed. 2d 88.

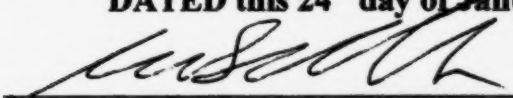
*Ruffallo*, previously cited, includes an insightful concurring opinion by Justice White. In holding that the lawyer Ruffalo's due process rights were violated, the court did not reach the substantive due process issue. However, Justice White observed that the violation that the lawyer was accused of (employing a moonlighting railroad person), was more a matter of preference than an ethics question. He opined:

**I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct. 390 U.S. at 556 (emphasis added)**

This case is like *Ruffalo* No other attorney has been similarly disciplined. No testimony at trial showed that the conduct was below the standard in the profession. The written disciplinary standards did not provide notice to the lawyer of when she would be considered to be violating her communication duties, and WSBA agrees that she did not prejudice her client. The original Bar Association investigator found no ethical violation. 4 of the 10 Disciplinary board members found no ethical violation. It was a deprivation of due process to be admonished when there were not sufficient facts or standards to provide notice to the lawyer that her conduct might result in an admonition, nor to admonish her in violation of published standards and in contravention of the contrary recommendations and decisions of 5 different WSBA agents who reviewed this case.

Apart from declining to review the issues herein, and thus tacitely approving the opinions from other States, this court has not directly addressed the issues herein, which affect lawyers nationwide. The U. S. Supreme Court should review this case in order to resolve the failure of the Washington State Supreme court to follow the Due Process clause, in procedure or substance, or to avail its attorneys with the equal protection of the laws.

**DATED this 24th day of January, 2003.**



**JEAN SCHIEDLER-BROWN, WSBA # 7753**

**APPENDIX A**

**THE SUPREME COURT OF WASHINGTON**

| | | |
|---|---|---|
| **IN RE:** | ) | |
| **JEAN SCHIEDLER-BROWN, ATTORNEY AT LAW** | ) | **BAR NO. 7753** |
| | ) | **ORDER DENYING PETITION FOR DISCRETIONARY REVIEW** |

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This matter came before the court on its October 31, 2002, En Banc Conference for consideration of Petitioner Jean Schiedler-Brown's Petition for Discretionary Review. The court having considered the Petition and the files herein and having unanimously agreed;

Now, therefore, it is hereby

ORDERED:

That Petitioner Jean Schiedler-Brown's Petition for Discretionary Review is denied.

Dated at Olympia, Washington, this 31st day of Ortober, 2002 [SEAL]

/S/

CHIEF JUSTICE

**APPENDIX 2**

**[FILED JULY 22, 2002
DISCIPLINARY BOARD]**

**BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION**

In re

Jean M. Schiedler-Brown
Lawyer
WSBA No. 7753

) Public no.00#00136
)
) DISCIPLINARY BOARD
) ORDER REGARDING
)HEARING OFFICER'S
)FINDINGS OF FACT,
)CONCLUSIONS OF LAW
)AND RECOMMENDA-
)TION

THIS MATTER came before the Disciplinary Board at its July 12, 2002 meeting. On review of the Hearing Officer's Findings of Fact, Conclusions of Law and recommendation and supporting documentation,

IT IS ORDERED that the Hearing Officer's findings of Fact, Conclusions of Law and Recommendation are approved and adopted.

The vote on this matter was: 6—4.

Those voting in the majority were: Cullen, Horne, Baumgardner, Leeper, Robson , and Schaps.

Those voting in the minority were: Dullanty, Bonnell,

Hayton and Wilson.

DATED this 19 day of July, 2002

/s/

**David Cullen, Chair**
Disciplinary Board

**APPENDIX C**

**BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION**

| | |
|---|---|
| In Re | ) Public No. 00136 |
| | ) |
| Jean M. Schiedler-Brown | ) Amended Findings |
| | ) of Fact, Conclusions |
| Lawyer | ) of Law,and Hearing |
| | )Officer's Recom- |
| WSBA # 7753 | ) endation |
| | ) |

Pursuant to Rule 4.10 of the Rules of Lawyer Discipline (RLD"), a disciplinary hearing was held before the undersigned Hearing Officer on October 10, 2001, a t the conclusion of which the hearing was closed. Respondent Lawyer Jean M. Schiedler-Brown (Schiedler-Brown") appeared at the hearing representing herself. Special Disciplinary counsel David A. Middaugh appeared for the Washington state Bar Association (WSBA). Findings of Fact, Conclusions of Law and Hearing Officer Recommendations were submitted on October 24th and lawyer Jean M. Schiedler-Brown filed a "Motion to correct Findings of Fact." Pursuant to that motion, the Hearing Officer made amendments to the Findings.

1. FORMAL COMPLAINT

An amended Formal complaint filed by Disciplinary Counsel on April 11, 2001, charged Schiedler-brown wit the

following counts of misconduct:

Count 1: Alleging Schiedler-Brown failed to respond to client William H. Rayburn's reasonable requests for information about the status of his case, in violation fo RPC 1.4 (communication) and/or RPC 5.1 (responsibility of a partner or supervising Lawyer.)

Count 2: Alleging Schiedler-Brown failed to file a petition for writ of certiorari on Rayburn's behalf by the required deadline in violation of RPC 1.3 (diligence) and/or RPC 5.1.

II FINDINGS OF FACT

The following facts were proven by a clear preponderance of the evidence.

1. FACTS RELATING TO ADMISSION TO PRACTICE.
   Jean M. Schiedler-Brown was admitted to the practice of law in the State of Washington in 1977.

2. FACTS RELATED TO WSBA GRIEVANCE.

2.1 SCHIEDLER-Brown has had a State contract to represent indigent institutionalized persons since 1986.

2.2 In or about April 1997, Respondent began representing William H. Rayburn in filing an appeal to the U.S. Court of Appeals for the Ninth Circuit. The appeal was from the U. S. District court, dismissing Mr. Rayburn's petition for writ of habeas corpus. The service promised to the client, inmate Rayburn was to take his case before the Ninth circuit Court of Appeals. This is memorialized in a letter to Mr. Rayburn in July, 1997.

2.3 Schiedler-Brown was always the attorney of record on appeal in Mr. Rayburn's case. S. Russell Joe, an associate in Schiedler-Brown's office, was initially assigned the primary responsibility for the appeal.

2.4 Mr. Joe filed a brief on Mr. Rayburn's behald and

transmitted it to Mr. Rayburn on August 25th. Shortly thereafter, Mr. Joe left Schiedler-Brown's office.

2.5 After august 25th, 1997, Mr. Rayburn wrote to Schiedler-Brown's office several times requesting information about the status of his appeal. Neither Schiedler-Brown nor anyone else in her office responded to Mr. Ray burn's requests in writing:

A. On september 9th, 1997, Mr. Rayburn wrote to Mr. Joe making suggestions to Mr. Joe about his appellate brief. Mr. Joe did not respond.

B. On September 25th, 1997, Mr. Rayburn wrote again to Mr. Joe and stated:

> I have not received a response to my last letter communication , questioning case schedule and possibility of oral presentation, and am concerned that you my not have received my letter.

Mr. Joe did not respond.

C. On October 10, 1997, Mr. Rayburn wrote to Mr. Joe at length about his appeal and stated, "I would enjoy a response when you have the time." Mr. Joe did not respond.

D. On October 13, 1997, Mr. Rayburn apparently again wrote to Mr. Joe about his appeal. This letter is missing from Schiedler-Brown's files. According to Mr. Rayburn, he was seeking to speak with Mr. Joe about his appeal. There was no response.

E. On November 1, 1997, Mr. Rayburn wrote to Schiedler-Brown, seeking information about his case. Mr. Rayburn stated in pertinent part:

> I have written three times since September 9, The latest of which included my concerns about a letter I received from the Court Clerk dated October 1, 1997. . . Mr. Joe has not responded to them, and I recently heard some

> rumor that he has left the firm. I'm turning to you for some measure of understanding and answer to my previous questions. I would appreciate a response a: your earliest.

Schiedler-Brown did not respond to Mr. Rayburn's letter.

F. On December 8, 1997, Schiedler-Brown's office sent a form letter to Mr. Rayburn, inserting his name in handwriting. The letter stated that her office "has received your request for legal services. . . you should receive correspondence from our office regarding your request for legal services within 60 days."

G. On December 10, 1997, Mr. Rayburn responded, "I am confused at receiving the enclosed notice. . .would it be possible to receive a status update on my case. . .

> I have heard rumors that Mr. S. Russell Joe is no longer with your firm. . . Has my case dropped from your representation because of his departure? And If not, would it be possible to receive a status update in my case.

Schiedler-Brown did not respond.

H. On December 17, 1997, Mr. Rayburn wrote the Clerk of the 9th[h] Circuit Court of Appeals about his appeal. In part, Mr. Rayburn wrote:

> I would also like to inform you, and the court, that I have been unable to contact my legal counsel. I have written several letters ince September 9, 1997, and have attempted phone contact, all unsuccessfully. .

A copy of this letter was sent to Schiedler-Brown, with no response.

I. On december 27, 1997, Respondent's office received notification of the dismissal of Mr.

Rayburn's case. No copy of the notification was sent to Mr. Rayburn, nor was he otherwise informed of the dismissal at that time.

J. On January 1, 1998, Mr. Rayburn wrote to Schiedler-Brown , again requesting a status update. Schiedler-Brown did not response to Mr. Ray burn's letter of January 1, 1998.

K. On February 24th, 1998, Mr.Rayburn, who still did not know his case had been dismissed, wrote to Schiedler-Brown about his appeal, and stated in part:

> My records reflect that your last contact with me was August 1997, and since that time you have failed to respond to any of my numerous phone calls or letters.

Schiedler-Brown did not respond to Mr. Rayburn's letter of February 24th which Mr. Rayburn also sent to the Washington State Bar Association.

L. In late February, Mr. Frank Becia of the office of Schiedler-Brown spoke to Mr. Rayburn's counselor, Tracy Daniels. In that telephone call, the counselor was told that a petition for certiorari would be filed by Schiedler-Brown's office. The evidence was not clear as to what else was said.

M. On March 17, 1998, Mr. Rayburn wrote to Schiedler-Brown included (sic) as follows:

> Approximately three weeks ago my counselor, Mr. Tracy Daniels, spoke with our office, Mr. Frank Becia, and relayed to me that you were filing a Writ of certiorari and that I would soon be receiving an affidavit to sign and return in my case. No affidavit has since arrived.
>
> Subsequently, I phoned your office and was informed that Mr. Becia was in the hospital, ill, and the secretary did not know

who would be taking on his caseload.

Despite my previous attempts—numerous letters and calls—you have never given my the status of my case, which I must keep respectfully requesting, and must assume Mr. Becia's conversation with Mr. Daniels was lost at the 9th Circuit level. In fact, my letters and calls to your office date back to September without any response.

I am concerned now that some time deadline will lapse to file a Writ—if that is indeed the next step. I have no clue! And I am unable to do any of this for myself. I would appreciate your attention to this matter with the utmost dispatch.

N. On March 31st, 1998, the Washington State bar Association sent Mr. Rayburn's letter of February 24th, 1998, to Schiedler-Brown. Schiedler-Brown did not respond to Mr. Rayburn.

O. On April 20th 1998 Mr. Rayburn wrote to the Washington State Bar Association, complaining that Schiedler-Brown had not responded to his letter of February 24th, 1998, or any of this requests for information. Mr. Rayburn wrote:

> . . .I am still having difficulty and no response from my attorney – Jean Schiedler-Brown. I would hope that our office can make some hint of difference, where it is obvious that a violation of RPC 1.3—at the least—has taken place.

After April 30th, 1998, Mr. Rayburn's letter of April 20th was forwarded to Schiedler-Brown along with a request that she respond directly to Mr. Rayburn with a copy to the Bar Association.

P. Schiedler-Brown finally responded to Mr.

Rayburn's concerns in her letter of May 4, 1998. In that letter, she did not address the failure of her office to communicate with Mr. Rayburn between September 1997 and April 1998.

2.8 The only contact Mr. Rayburn had with Respondent's office between August 25th 1997 and May 4th 1998, was a telephone call from a counselor at Mr. Rayburn's prison to an associate at Schiedler-Brown's office, in February, between the 20th and 27th, and a form letter.

2.9 Schiedler-brown assigned responsibility for filing a petition to the U.S. Supreme Court for a writ of certiorari in Mr. Rayburn's case to another associate in her office. On February 28th that associate left Schiedler-Brown's employ without prior notice, 21 days before the due date for Mr. Rayburn's petition.

2.10 Schiedler-Brown and her associates began but did not complete the petition for writ of certiorari.

2.11 It was Mr. Rayburn's desire and schiedler-Brown's offices' intentions to file a petition for writ of certiorari asking for review of this decision. Schiedler-brown was unable to file a petition for writ of certiorari in a timely fashion. Instead, she filed a "motion for extension of time to file petition for a writ of certiorari." (No copy of this motion was sent to Mr. Rayburn.) In this motion, Schiedler-brown explained the reasons why she was unable to file Mr. Rayburn's petition for writ of certiorari.

2.12 Schiedler-Brown moved the U.S. Supreme court for an extension of time to submit the petition. The motion was denied. A copy of the letter denying the motion was not sent to Mr. Rayburn.

2.13 The Supreme court denied the application for an extension of time on April 16, 1998.

III CONCLUSIONS OF LAW

Schiedler-Brown's conduct in failing to keep her client reasonably informed and respond to reasonable requests for information violated RPC 1.4 (communication) and/or RPC 5.1 (responsibilities of a partner or supervising lawyer.) With respect to this conduct Schiedler-Brown acted negligently. The WSBA has failed to sustain its burden of proof with respect to Count 2, with regard to her duty to file a writ of certiorari on Mr. Rayburn's behalf.

IV. APPLICATION TO AMERICAN BAR ASSOCIATION STANDARDS.

1. Disciplinary sanctions are determined using the American bar Association standards for imposing lawyer sanctions (ABA Standards) as a framework. *In re Johnson* 114 Wn.2d 737 (1990). The ABA Standards provide that the following sections are to be considered in determining the appropriate disciplinary sanction:
   (a) the duty violated;
   (b) the lawyer's mental state;
   (c) the potential or actual injury caused by the lawyer misconduct; and
   (d) the existence of aggravating or mitigating factors.

ABA Standard 3.0. Assessment of the duty owed in light of the lawyer's mental state and the injury or potential injury yields a presumptive sanction. Once the presumptive sanction is determined, aggravating or mitigating factors and considered.

2. Based on the foregoing Findings of Fact and Conclusions of Law, the applicable ABA Standards are set forth in the following

paragraphs of this section:

4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information and causes little or no action or potential injury to the client.

V. AGGRAVATING AND MITIGATING FACTORS

1. The following aggravating factors contained in section 9.22 of the ABA Standards are applicable in this case:
   (g) refusal to acknowledge wrongful nature of conduct;
   (h) vulnerability of victims;
   (i) substantial experience in the practice of law.
2. The following mitigating factors contained in section 9.32 of the ABA standards are applicable to this case:
   (a) absence of prior disciplinary record;
   (b) Absence of personal or dishonest motive;
   (c) Personal or emotional problems (staffing difficulties);
   (d) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

VI. RECOMMENDATION

Based upon the applicable ABA standards and athe aggravating and mitigating factors, the Hearing Officer recommends that Respondent Jean Schiedler-Brown be admonished. Schiedler-Brown also submitted after the hearing what she designated "post

trial motions" asking the Hearing Officer to reconsider evidence rulings at the hearing. She additionally presented a timeline as requested by the Hearing Officer. Bar counsel responded. The Hearing Officer hereby denies the "Post Trial Motions", having already ruled on these evidentiary issues at the hearing and being presented with no additional persuasive arguments.

DATED this 14th day of November, 2001.

/S/

Mary H. Wechsler, Hearing Officer

CERTIFICATE OF MAILING

I CERTIFY THAT I CAUSED A COPY OF THE FOREGOING amended findings of fact, Conclusions of Law, and Hearing Officer's Recommendation to Jean M. Schiedler-Brown, respondent, and David Middaugh. First class mail, postage prepaid, on the 14th day of November, 2001. The original was mailed to Angie Ordway, clerk to the Disciplinary Board, for service on the respondent.

/S/

Chad Clark

**APPENDIX D: Constitutional issues raised below**

II SIGNIFICANT QUESTION S UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSITUTTION ARE PRESENTED.

a. Due Process violations included:

--Denial of discovery of similar disciplinary counsel files;

--Exclusion of relevant and material letters by complainant;

--Adoption of findings that were unsupported by evidence in the record.

b. Equal Protection violations included:

--Exclusion of an exhibit in which Disciplinary counsel admitted that similar complaints against other attorneys had been dismissed.

--exclusion of an exhibit demonstrating prejudicial errors by other indigent defense counsel, and which were not referred for discipline.

--No previous lawyer has been admonished for failure to 'reasonably' communicate, if no other rules were violated and the client's case is not prejudiced.

(pp. 1 and 2, relevant portions, of Petition for Review to Washington State Supreme Court)

II A SIGNIFICANT ISSUE UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES ARE PRESENTED.

c. Due Process violations included:

--Denial of discovery of disciplinary counsel practices, evidence directly bearing upon determination of a material fact. The Supreme

Court has recognized that an attorney ahs the right to

procedural due process in a disciplinary proceeding. Matter of Deming, 108 Wn.2d 82, 736 P.2d 639 (1987), (Citing Matthew v. Eldridge 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893 (1976).) Due Process means receiving a hearing in a meaningful time and in a meaningful manner; procedural safeguards must be tailored to the specific functions to be served by them. Id.

The lawyer needed discovery of the WSBA disciplinary files to compare handling of complaints regarding communication with clients. Without the data, she did not receive a meaningful hearing on the issue of proportionality. Discovery has a basis in the due Process clause of the 14th amendment of the U.S. Constitution, and of article 1, section 10 of the Washington State Constitution. The right to discovery is an important aspect of the right to access to the courts, and CR 26 implement the particular interests of parties in furtherance of the principles of access. John Doe v. Blood Center 117 Wn 2d 772, P. 2d 370, (1991). (Accord, Conway V. State Bar of California, (1989), 767 P.2d 657, 47 C3d 1107, 255 Cal. Rptr.390; property interest in the practice of law cannot be affected without due process; State ex rel Nebraska State bar v. Dineen (1990) 455 N.W. 2d 178, 235 Neb.363; lawyer is entitled to due process in disciplinary proceedings.)

John Doe involved discovery of medical information. Like Bar Association files, medical information is "private" information. However, the Doe case, like Guillen and Cook, broadly construed a CR 26 right to discovery.

The court in Cook observed that it is a 'fact of life" that private files may contain different information than is made public by an agency. The lawyer's only source of proving proportionality, which under Haskell she has a right to prove, is to discovery of disciplinary files. Without it, she has not had a meaningful hearing.

B-The exclusion of relevant and material letters by

complainant, Mr. Rayburn, demonstrating his habit of repetitive communication, was a violation of due process.

A central issue in the case is the reasonableness of communication. Exhibit 36 was a set of letters, demonstrating that Mr. Rayburn had a unique habit of writing a letter once per month and asking for a status in his case. He repeated that same pattern as this case was investigated by the Bar Association, making many of the same " lack of communication" allegations against Bar counsel as he did of the lawyer in this case. This evidence puts Mr. Rayburn's requests in perspective— he asked for information as a habit, and not because of a particular need

C. It was a violation of due process for the Board to Adopt ultimate findings that were unsupported by any evidence in the record. The finding that the lawyer violated a standard, when the only standard in evidence was followed, and other conclusions not supported by facts in the record, outlined at footnote * above, were arbitrary conclusions and therefore did not provide a meaningful opportunity to have this matter considered upon the evidence.

B A lawyer's right to equal protection against arbitrary and capricious discipline, that is to be treated consistently with other similarly situated lawyers, is based upon the Equal Protection clause of the 14th Amendment of the U.S. Constitution. Nordinger v. Hahn (U.S. Cal 1992); 1121 S.Ct. 2326. In addition to the Haskell case, previously cited, this court has repeatedly reiterated the importance of the proportionality prong of the disciplinary process. In re Tasker 141 Wn 2d 557, 9 P.3d 822 (2000). Proportionality is a mandatory element of analysis, of Constitutional magnitude.

1. The board excluded an exhibit in which the bar Association Disciplinary counsel admitted that similar complaints against other attorneys had been dismissed. The exhibit, number 35, attached as Appendix G, is an

admission that similar complaints against prison counsel were dismissed in the past. Exclusion prevented the equal protection analysis.

2. The board excluded an exhibit demonstrating errors by (other) indigent defense counsel, prejudicing constitutional rights, and which were not referred for discipline. Exhibit number 37 includes materials kept in the ordinary course of business by the lawyer. **

These documents demonstrate all too common errors by indigent

defense counsel. These are a fact of life in the current criminal defense system. Further, the way in which other attorneys, courts, and the legal system address these errors is to allow remedial action for the inmates, not to discipline numerous defense counsel.

This exhibit should have been admitted and considered. The names of counsel in these exhibits do not appear in the public WSBA disciplinary files. In the Haskell case, the Supreme Court learned of only one case that had ordered a lesser remedy, and on that basis, reduced the sanction. In this case, all known comparisons show that far more serious error routinely goes undisciplined.

One need only track the recent plethora of ineffective assistance of counsel cases to see that the WSBA policy regarding defense lawyers' errors is nondisciplinary. The criteria strongly presumes that counsel is effective. One must show that counsel fell below an objective standard, and the defendant was actually prejudiced. State v. Acevedo 137 Wn. 2d 179 (1999). Since 1997, increasing cases have found counsel ineffective.

**There is the PRP of Kenyon, a successful PRP reducing an erroneous sentence by more than 3 years; PRP of Davis, whose sentence was 15 years too long; Matter of Link, whose erroneous Community Placement was removed by agreement with prosecutor; Letter

regarding Brown, whose sentence was shortened by 154 days after credit for good time was obtained; letter to assist appellate counsel to reduce excessive sentence by 20 months; Cormier, who received 20 additional months; White, who received 56 days of previously miscalculated good time, and Labensky, whose sentence was 60 months too long under applicable law.

Courts have also relaxed the standard for appealing errors not objected to below. A basis for this is a glut of valid PRP's by inmates, with errors of counsel that imprisoned them for extra days, months, and years.
For each of these cases, there was a defense counsel who committed a glaring error, failing to accurately read the sentencing statutes; yet, none of these counsel's names are found in public discipline files of the Bar. The conduct of all of these lawyers came to the attention of other lawyers and of numerous judges, without any referral and/or imposition of discipline. In the criminal defense area, even negligent behavior, if in good faith, is not usually referred for discipline.
(Pages 13—17, Petition for Discretionary Review, regarding Constitutional issues presented.)